

November 2005

MJI Publications Updates

Crime Victim Rights Manual (Revised Edition)

**Criminal Procedure Monograph 8—
Felony Sentencing**

Domestic Violence Benchbook (3rd ed)

**Friend of the Court Domestic Violence
Resource Book (Revised Edition)**

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

November 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 5

Victim Privacy

5.9 Limitations on Access to Court Records

A. General Provisions Limiting Access to Court Records

Insert the following text before the September 2005 update to page 107:

Transcripts generated from court proceedings and filed with the court clerk “are a part of the record for purposes of a sealing order” issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following language after the July 2005 update to page 264:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender’s Prior Record Variables (PRVs)

G. PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

Insert the following text after the two bullets near the top of page 29:

A discharge and dismissal following a defendant’s successful completion of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring PRV 5. *People v James*, ___ Mich App ___, ___ (2005). MCL 333.7411(1) specifically states that “[d]ischarge and dismissal under [7411] shall be without adjudication of guilt and . . . is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime”

8.6 Scoring an Offender's Offense Variables (OVs)

E. OV 4—Psychological Injury to a Victim

2. Case Law Under the Statutory Guidelines

Insert the following text at the bottom of page 48:

The Court of Appeals affirmed the trial court's scoring of ten points for OV 4 based primarily on the Court's conclusion that videotaped evidence showed the victims behaving in a manner that indicated both victims had suffered serious psychological injury as a result of the defendant's conduct. *People v Wilkens*, ___ Mich App ___, ___ (2005).

Said the *Wilkens* Court:

“With regard to the male victim, the videotape reveals that his attitude took a disturbing turn during the course of the forty-one minute incident. Toward the end, he resorted to making violent threats against the female victim to coerce her into continuing the sex acts. This, in light of the fact that the male victim's demeanor on the stand was rather casual, indicates that the male victim suffered serious psychological injury as a result of this incident such that he was rendered unable to comprehend the gravity of his actions. This supports the trial court's scoring of OV 4.

“With regard to the female victim, the trial court relied on statements that she made ‘on the videotape and everything else.’ Though the female victim did not testify, the videotape shows that the female victim repeatedly indicated that she did not want to continue the sex acts and that the ‘motion lotion’ was hurting her. Yet defendant asserted that the videotape was not worth the money he spent on the clothes and urged the female victim to continue. Ultimately, the female victim sat up in bed and remained silent while defendant attempted to coax her into continuing. This evidence indicates that defendant's actions caused the female victim anxiety, altered her demeanor, and caused her to withdraw; it supports a finding of serious psychological injury occurring to the female victim.” *Wilkens, supra* at ____.

8.6 Scoring an Offender's Offense Variables (OVs)

H. OV 7—Aggravated Physical Abuse

2. Case Law Under the Statutory Guidelines

Insert the following text before the first paragraph on page 53:

The assessment of points under OV 7 does not depend on whether the victim is alive or conscious of the treatment scored by this variable. *People v Kegler*, ___ Mich App ___, ___ (2005). Points are properly scored under OV 7 when a victim is treated with excessive brutality no matter how (or if) the victim subjectively experiences that treatment. Although OV 7 does account for a victim's treatment when the victim is conscious, its application is not limited to those criminal episodes where a victim's consciousness is implicitly required (when points are assessed for conduct intended to increase a victim's fear and anxiety). *Kegler, supra* at ___.

Insert the following text at the bottom of page 53:

Fifty points were appropriate where "the record indicates that defendant repeatedly stomped on the victim's face and chest after the victim was lying unconscious on the ground. Additionally, the victim was deprived of oxygen for a period of four to six minutes . . . and currently remains comatose with little or no chance of ever regaining consciousness." *People v James*, ___ Mich App ___, ___ (2005).

8.6 Scoring an Offender's Offense Variables (OVs)

I. OV 8—Victim Asportation or Captivity

2. Case Law Under the Statutory Guidelines

Add the following text after the third paragraph on page 56:

See also *People v Cox*, ___ Mich App ___, ___ (2005), where OV 8 was properly scored because even though the victim had been to the defendant's house on other occasions, the defendant was the individual who transported the victim to the defendant's house at the time the sexual offenses occurred.

8.6 Scoring an Offender's Offense Variables (OVs)

J. OV 9—Number of Victims

2. Case Law Under the Statutory Guidelines

Insert the following text after the second paragraph on page 58:

Ten points were appropriate under OV 9 where videotaped evidence showed a female victim and a male victim actually being harmed, or being placed in danger of injury, as a result of the defendant's conduct. *People v Wilkens*, ____ Mich App ____, ____ (2005).

8.6 Scoring an Offender's Offense Variables (OVs)

K. OV 10—Exploitation of a Vulnerable Victim

2. Case Law Under the Statutory Guidelines

Vulnerability—age of the victim.

Insert the following text after the partial paragraph at the top of page 62:

Points were appropriate under OV 10 where the “defendant ‘exploited’ the victim’s youth by manipulating her with clothes and alcohol in exchange for [her participation in] making the sexually abusive videotape.” *People v Wilkens*, ___ Mich App ___, ___ (2005).

Predatory conduct.

Add the following text after the second full paragraph on page 63:

See also *People v Cox*, ___ Mich App ___, ___ (2005), where points were properly scored for predatory or preoffense conduct when the defendant engaged in sexual conduct with “a seventeen-year-old mentally incapable victim.” In addition to the questions concerning the victim’s mental status, evidence established that the defendant visited the victim at his foster home, the victim had been to the defendant’s home on several occasions and had viewed pornographic material there, and the “defendant admitted to harboring the victim as a runaway from a foster home.”

8.6 Scoring an Offender's Offense Variables (OVs)

L. OV 11—Criminal Sexual Penetration

2. Case Law Under the Statutory Guidelines

Insert the following text on page 66 before the paragraph beginning with “3. Relevant Case Law...”:

OV 11 was properly scored at 25 points in Count 1 “because defendant was charged with only one penetration, yet he penetrated the female victim more than once during the making of the videotape” (evidence showed that the defendant penetrated the victim with his mouth and with a sex toy). *People v Wilkens*, ___ Mich App ___, ___ (2005). OV 11 was also properly scored at 25 points in Count 2 where the evidence established that, in addition to at least one other penetration, the defendant aided and abetted the male victim's penetration of the female victim.

See also *People v Cox*, ___ Mich App ___, ___ (2005), where the Court of Appeals affirmed an OV 11 score of 25 points for one penetration even when the defendant was convicted of two counts of CSC-1 for the two penetrations arising from the sentencing offense. According to the Court, “the proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC.”

8.6 Scoring an Offender's Offense Variables (OVs)

N. OV 13—Continuing Pattern of Criminal Behavior

2. Case Law Under the Statutory Guidelines

Insert the following text after the first paragraph on page 70:

OV 13 was properly scored at 25 points where the defendant was convicted of two felony offenses against a person and had two first-degree CSC charges pending at the time he was sentenced. *People v Wilkens*, ___ Mich App ___, ___ (2005).

8.6 Scoring an Offender's Offense Variables (OVs)

P. OV 15—Aggravated Controlled Substance Offenses

2. Case Law Under the Statutory Guidelines

Insert the following text before the first paragraph on page 74:

Dicta appearing in a case remanded for articulation of a substantial and compelling reason for departure indicates that, for purposes of scoring the guidelines, a person may “deliver” a controlled substance by injecting the substance into another person. *People v Havens*, ___ Mich App ___, ___ (2005). According to the Court:

“We assume that if injection constitutes delivery for purposes of conviction,* the same act constitutes delivery for purposes of scoring Offense Variable 15, MCL 777.45, aggravated controlled substance offenses, at twenty-five points for delivery of a controlled substance other than marijuana to a minor.” *Havens, supra* at ___.

*The *Havens* Court cited *People v Schultz*, 246 Mich App 695, 701–709 (2001), as support for the conclusion that a person can deliver a controlled substance for purposes of conviction by injecting it into another person.

Part IV—Habitual Offender Provisions

8.16 Sentencing an Offender for a Subsequent “Major Controlled Substance Offense”

C. Discretionary Sentence Enhancement—MCL 333.7413(2)

Insert the following text on page 107 immediately before the quotation of MCL 333.7413(5):

The discretionary authority in MCL 333.7413(2) to sentence a repeat offender to not more than twice the term of imprisonment otherwise authorized includes an increase in both the minimum and maximum terms in the range recommended by the statutory sentencing guidelines. *People v Williams*, ___ Mich App ___, ___ (2005). In *Williams*, the trial court properly concluded that MCL 333.7413(2) authorized it to double both values in the range recommended under the guidelines—in that case, from the range of 5 to 23 months “otherwise authorized” for conviction, to a range of 10 to 46 months. The Court of Appeals agreed:

“[T]he clear and unambiguous language of §7413(2) does not differentiate or suggest a distinction, either explicitly or implicitly, between maximum and minimum sentences; therefore, the word ‘term’ can entail and contemplate both maximum and minimum sentences.” *Williams, supra* at ___.

Part VI—Fashioning an Appropriate Sentence

8.31 Sentence Credit

Sheriff's good-time credits.

Insert the following text after the quoted paragraph on page 150:

Good-time credit earned during a sentence that is later declared invalid does not transfer to the sentence imposed after the first sentence was declared invalid. *People v Tyrpin*, ___ Mich App ___, ___ (2005). When a defendant is resentenced after a previous sentence is voided, the defendant is entitled only to credit for the number of days he actually spent incarcerated pursuant to the invalid sentence. Credits earned during the time served on the invalid sentence may not be applied to the defendant's sentence on remand. *Tyrpin*, *supra* at ___.

Part VIII—Specific Types of Sentences

8.42 Deferred Adjudication of Guilt

H. Discharge and Dismissal Without Entry of an Adjudication of Guilt

§7411.

Insert the following text before the first paragraph on page 186:

A discharge and dismissal following a defendant's successful fulfillment of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring PRV 5. *People v James*, ___ Mich App ___, ___ (2005). MCL 333.7411(1) specifically states that “[d]ischarge and dismissal under [7411] shall be without adjudication of guilt and . . . is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime”

Part IX—Sentence Departures

8.48 Requirements of a Sentence Departure

A. Substantial and Compelling Reason

Insert the following text after the third paragraph on page 198:

A trial court's characterization of the defendant's offenses as "egregious" is not an objective and verifiable determination that may be used as a substantial and compelling reason to depart from the statutory guidelines. *People v Havens*, ___ Mich App ___, ___ (2005).

Part IX—Sentence Departures

8.51 Exceptions: When a Departure Is Not a Departure

Insert the following text immediately before Part X at the top of page 209:

Enhancement under the repeat offender provision of MCL 333.7413(2).

When MCL 333.7413(2) permits a court to impose a sentence of not more than twice the term otherwise authorized, the enhancement authority extends to both the minimum and maximum terms. *People v Williams*, ___ Mich App ___, ___ (2005). For example, if the recommended minimum range under the guidelines is 5 to 23 months, §7413(2) permits an increase in both the upper and lower limit of the recommended range so that the allowable range would be 10 to 46 months. When, subject to the ranges discussed above, a court imposes a minimum sentence of 38 months, the sentence falls within the enhanced range authorized by §7413(2). Therefore, even though a term of 38 months exceeds the original range of 5 to 23 months, the sentence does not represent a departure for which a trial court must articulate a substantial and compelling reason.

When probation is an authorized alternative to imprisonment. Where the defendant was convicted of indecent exposure as a sexually delinquent person, the court has discretion in determining whether to sentence the defendant to jail, prison, or probation. *People v Buehler (On Remand)*, ___ Mich App ___, ___ (2005). Because probation is a valid alternative to incarceration under those circumstances, a sentence of probation is not a departure from the term of imprisonment recommended under the statutory sentencing guidelines. *Buehler, supra* at ___.

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

Insert the following text immediately before subsection (A) on page 210:

As set forth above, effective January 1, 2006, the deadline for filing a motion to correct an invalid sentence under MCR 6.429(B) is six months after entry of the judgment of conviction and sentence. In Administrative Order No. 2005-2, ___ Mich ___ (2005), the Court clarified that the rule is inapplicable to cases in which an order appointing appellate counsel entered before or on December 31, 2005. In cases in which an order appointing appellate counsel entered before or on December 31, 2005, a defendant must file a motion to correct an invalid sentence within 12 months of the date of the order appointing appellate counsel.

November 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 10

Case Management for Safety in Domestic Relations Cases

10.4 Confidentiality of Records Identifying the Whereabouts of Abused Individuals

A. Confidentiality in Friend of the Court Records Generally

Insert the following text before the September 2005 update to page 435:

Transcripts generated from court proceedings and filed with the court clerk “are a part of the record for purposes of a sealing order” issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

November 2005

Update: Friend of the Court Domestic Violence Resource Book (Revised Edition)

CHAPTER 2

Screening and Case Management

2.13 Confidentiality of Records Identifying the Whereabouts of Abused Individuals

A. Confidentiality in Friend of the Court Records Generally

Insert the following text before the September 2005 update to page 58:

Transcripts generated from court proceedings and filed with the court clerk “are a part of the record for purposes of a sealing order” issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records

F. Limits on Access to Court Records—MCR 8.119(F)

Insert the following text at the top of page 5:

Transcripts generated from court proceedings and filed with the court clerk “are a part of the record for purposes of a sealing order” issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the June 2005 update to page 112:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

B. Timing

Insert the following text immediately before sub-subsection (1) on page 175:

In an unpublished decision, the Court of Appeals has held that a court may set deadlines for motions for summary disposition pursuant to MCR 2.401(B)(2)(a)(ii), as that more specific rule controls over the general rule that motions under MCR 2.116 may be filed at any time. *Kemerko Clawson LLC v RXIV Inc*, unpublished opinion per curiam of the Court of Appeals, decided October 20, 2005 (Docket No. 255887). The court questioned the conclusion in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich 241, 248 (2002), rev'd 472 Mich 44 (2005), cited below.

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.48 Jury Deliberation

A. Materials in Jury Room

On page 231, before the final paragraph in this subsection, add the following text:

If, after the jury returns its verdict, the court discovers that material was provided to the jury that was not admitted into evidence, before addressing a possible remedy, the court should conduct a hearing to determine whether the jury reviewed the non-admitted materials. *Mays v Schell*, ___ Mich App ___, ___ (2005). A jury's consideration of documents that were not admitted into evidence "does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case." *Id.* at ___, quoting *Phillips v Diehm*, 213 Mich App 389, 402–03 (1995). This includes a determination whether the documents were actually considered by the jury in reaching a verdict. *Mays, supra* at ___, quoting *People v McCrea*, 303 Mich 213, 266 (1942). In *Mays*, during deliberations in a medical malpractice case, the jury requested the plaintiff's complete medical records. Inadvertently, the jury was provided with defense counsel's banker's box, which contained numerous items about the case that were not admitted at trial: other medical records, deposition transcripts, deposition summaries, memos to the file, correspondence with the client and the client's insurance company, and defense counsel's notes. The Court of Appeals overturned the trial court's decision granting a new trial "because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence"

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the July 2005 update to page 415:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence

violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ____.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

A. Materials in Jury Room

Add the following text immediately before subsection (B):

If, after the jury returns its verdict, the court discovers that material was provided to the jury that was not admitted into evidence, before addressing a possible remedy, the court should conduct a hearing to determine whether the jury reviewed the non-admitted materials. *Mays v Schell*, ___ Mich App ___, ___ (2005). A jury’s consideration of documents that were not admitted into evidence “does not constitute error requiring reversal unless the error operated to substantially prejudice the party’s case.” *Id.* at ___, quoting *Phillips v Diehm*, 213 Mich App 389, 402–03 (1995). This includes a determination whether the documents were actually considered by the jury in reaching a verdict. *Mays, supra* at ___, quoting *People v McCrea*, 303 Mich 213, 266 (1942). In *Mays*, during deliberations in a medical malpractice case, the jury requested the plaintiff’s complete medical records. Inadvertently, the jury was provided with defense counsel’s banker’s box, which contained numerous items about the case that were not admitted at trial: other medical records, deposition transcripts, deposition summaries, memos to the file, correspondence with the client and the client’s insurance company, and defense counsel’s notes. The Court of Appeals overturned the trial court’s decision granting a new trial “because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence”

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Add the following text to the end of the first paragraph on page 463:

Alternatively, the court may place the defendant on probation. *People v Buehler*, ___ Mich App ___, ___ (2005).

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

O. “Mentally Incapable”

Insert the following text on page 85 before the last full paragraph in this subsection:

A victim may be “mentally incapable” of fully understanding the nonphysical factors involved in sexual conduct with a defendant even though the victim demonstrated his comprehension of the physical nature of the sexual relationship between himself and the defendant, as well as an “awareness of the events as they occurred.” *People v Cox*, ___ Mich App ___, ___ (2005), citing *People v Breck*, 230 Mich App 450, 455 (1998). In *Cox*, the defendant was convicted of two counts of CSC-3 for engaging in prohibited conduct with a “mentally incapable” seventeen year old. The defendant argued that the victim could not be considered “mentally incapable” because “the victim attended school, was able to perform automotive repairs, could hold conversations and maintain relationships with people, and could choose his sexual partner.” The Court disagreed. According to the Court, “ample evidence” was presented at trial to support a finding that the victim was “mentally incapable” of consenting to the sexual relationship with the defendant:

“The victim’s Family Independence Agency caseworker testified that the victim was not ready to live on his own and that he was easily manipulated and persuaded to do things that he probably would not do without another’s influence.

* * *

“A psychologist who examined the victim testified that he had a significant history of abuse and neglect, and was mentally deficient, functioning in the ‘borderline’ range of intelligence,

which is a step below ‘below average’ and a step above ‘mental retardation.’ . . . [The psychologist] characterized the victim as a ‘pretty immature individual,’ and opined that even though the victim ‘certainly . . . knew what was proposed’ and was aware of his conduct, he could not appreciate the social or moral significance of his acts relating to the homosexual encounter with defendant, and was incapable of making an informed decision about sexual involvement.

“A counselor . . . described [the victim] as impressionable, very susceptible to manipulation by others, and characterized him as a follower. . . . [The counselor] stated that the victim’s need for acceptance is so great that he gravitates to anyone who will pay attention to him, and cannot distinguish whether a person is being genuine in their [sic] actions.” *Cox, supra* at ____.

The defendant also argued that there was insufficient evidence in support of finding that he “knew or had reason to know” that the victim was mentally incapable. The *Cox* Court, citing *People v Davis*, 102 Mich App 403, 406–407 (1980), explained that the language used in MCL 750.520d(1)(c)—“knows or has reason to know”—functions only to “eliminate liability where the mental defect is not apparent to reasonable persons.” *Cox, supra* at ____, quoting *Davis, supra* at 407. According to the *Cox* Court, sufficient evidence was presented to refute the defendant’s claim:

“[S]everal witnesses testified that the fact that the victim was mentally deficient is readily noticeable after only a short period of interaction. The psychologist opined that a reasonable person could discern within an hour that the victim has a mental defect, because the victim has inarticulate language, difficulty understanding words, and does not make inquiries typical of a seventeen-year-old.” *Cox, supra* at ____.

The *Cox* Court also noted that the defendant had “ample opportunity to notice [the victim’s] limitations.” Evidence showed that the victim had visited the defendant’s home on five to ten occasions, and that the defendant went to see the victim at the victim’s foster home.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the July 2005 update to page 364:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.